Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

GREGG BLACKSTOCK,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Petition For Writ Of Certiorari To The New Hampshire Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment protect priest-penitent communications and thus bar a criminal prosecution arising solely from clergy's disclosure to the police made in violation of that privilege?
2. Does the First Amendment preclude the admission of priest-penitent communications for the purpose of impeaching a criminal defendant's testimony?
3. Was trial counsel ineffective for failing to properly preserve and argue the above First Amendment issues?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner is an inmate housed at the New Hampshire State Prison, 281 North State Street, Concord, New Hampshire, 03301.

Respondent

Respondent, State of New Hampshire, is the political entity that prosecuted petitioner through the Hillsborough County Attorney's Office, 20 Spring Street, Nashua, New Hampshire, 03060, and the New Hampshire Department of Justice, 33 Capitol Street, Concord, New Hampshire, 03301.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gregg Blackstock respectfully asks that this Court issue a writ of certiorari to review the judgment of the New Hampshire Supreme Court.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court, which summarily affirmed the trial court's order, is not reported and is reprinted in Appendix A at page App. 1. The trial court's order denying petitioner's motion for a new trial is not reported and is reprinted in Appendix B at page App. 3. The New Hampshire Supreme Court's order affirming petitioner's convictions on direct appeal is not reported and is reprinted in Appendix C, at page App. 12.

JURISDICTION

Petitioner invokes this court's jurisdiction to review the final judgment of the New Hampshire Supreme Court pursuant to 28 U.S.C. §1257(a). The New Hampshire Supreme Court issued its decision on December 23, 2003. This petition has been filed within 90 days of that decision. Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense throughout.

STATEMENT OF THE CASE

1. Nature of the Suit; State Trial Court.

Petitioner was charged with three counts of sexual assault involving two minors. The genesis of the criminal prosecution was petitioner's disclosures to his religious elders. The relevant facts were succinctly stated by the trial court:

> The defendant and the girls are both Jehovah's Witnesses. When an elder in the church received a complaint from the victims' mother that the defendant sexually abused the girls, he required the defendant to submit to questioning in the presence of two other elders. Under Jehovah's Witness practice and custom, this questioning is necessary to remain in good standing in the church, and is understood to be confidential. A church elder privy to the conversation reported the defendant's interview to the police, which resulted in the convictions in this case.

App. 6. A New Hampshire statute requires clergy to report suspected child abuse to law enforcement. N.H. Rev. Stat. Annot. ("RSA") 516:35.

Trial counsel did not move to dismiss the prosecution as fruit of the elder's unconstitutional disclosure to law enforcement. And although trial counsel did move to exclude his statements to the elders from trial, and although the trial court found the statements to be inadmissible under Rule 505, N.H. Rules of Evidence, the trial court nonetheless allowed the state to impeach petitioner with the privileged statements should he testify.

Petitioner did not testify. The jury convicted petitioner on all three counts. The trial court imposed a prison sentence of 10 to 20 years.

2. Direct Appeal to the New Hampshire Supreme Court.

On direct appeal, counsel did not argue the privilege issues – counsel did not argue that the entire prosecution stemmed from an illegal breach of a constitutionally protected privilege and should have been dismissed, as occurs when the fruits of an illegal search is suppressed, and counsel did not argue that the evidentiary ruling violated the priest-penitent privilege.

The New Hampshire Supreme Court affirmed by unpublished order. App. 12.

3. Motion for New Trial before the State Trial Court.

Petitioner filed a motion for new trial alleging ineffective assistance of counsel. First, under a fruit of the poisonous tree argument, petitioner argued that the clergy-to-police disclosure was illegal and all subsequent prosecutorial activity should have been suppressed.

Second, petitioner argued the trial court erred by ruling the state could impeach petitioner with his privileged statements to clergy. Third, petitioner argued counsel's failure to preserve and pursue these two arguments amounted to ineffective assistance of counsel.

The trial court addressed the First Amendment issues on the merits to determine whether petitioner could meet the prejudice prong of the ineffective assistance of counsel analysis. Finding no constitutional violations, the trial court rejected the claim of ineffective assistance and denied petitioner's motion for new trial. App. 10.

4. Second Appeal to the New Hampshire Supreme Court.

Petitioner timely appealed to the New Hampshire Supreme Court. By order dated December 23, 2003, the New Hampshire Supreme Court summarily affirmed the trial court's order. App. 1. Petitioner now seeks review from this court.

REASONS FOR GRANTING THE WRIT

This writ should be granted to "decide[] an important question of federal law which has not been, but should be, settled by this Court," Supreme Court Rule 10(c), primarily whether the priest-penitent privilege enjoys constitutional protection.

A. Petitioner's Convictions Resulted from a Violation of the Priest-Penitent Privilege.

This court has long recognized the existence of the priest-penitent privilege, beginning in the nineteenth century, *see Totten v. United States*, 92 U.S. 105, 107 (1876) ("suits cannot be maintained which would require a disclosure of the confidences of the confessional"), and continuing to modern times, *see United States v. Nixon*, 418 U.S. 683, 709 (1974) ("a priest may not be required to disclose what has been revealed in professional confidence"); *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return").

Courts generally accept that the privilege applies to disclosures made to church "elders," *see* Annotation, *Who Is "Clergyman" or the Like Entitled to Assert Privilege Attaching to Clergymen or Spiritual Advisors*, 49 A.L.R.3d 1205 §5, and that the state cannot compel evidence of crimes from the seal of the confessional, Annotation, *Matters to Which the Privilege Covering Communications to Clergyman or Spiritual Adviser Extends*, 71 A.L.R.3d 794 §8(a).

New Hampshire codified the priest-penitent privilege at RSA 516:35, and Rule 505, N.H. Rules of Evidence. But, through other statutes, New Hampshire abrogated the privilege in child abuse and neglect cases, RSA 169-C:32, requiring clergy to report suspected child abuse and neglect, RSA 169-C:29, as was done in this case.

As a matter of established fact, the priest-penitent privilege was violated in petitioner's case when "[a] church elder privy to the conversation reported the defendant's interview to the police, which resulted in the convictions in this case." App. 6.

B. The Priest-Penitent Privilege Enjoys a Constitutional Heritage.

If the priest-penitent privilege is a mere common law doctrine, then New Hampshire is free to statutorily override the privilege in the case of suspected child abuse, the trial court can place evidentiary limitations on the privilege's scope at trial, and petitioner's convictions stand. If, however, the privilege flows from the First Amendment, then New Hampshire's statutes and rules to the contrary and petitioner's convictions must fall.

This court's recognition of the priest-penitent privilege in *Totten*, *Nixon* and *Trammel*, are *dicta* and do not specify the privilege's source. To find the source of the privilege – to decide whether the privilege enjoys a constitutional or common law lineage – one must examine the historical origins of the priest-penitent privilege.

The priest-penitent privilege had firmly arrived in England from the predominantly Catholic continent by the time of the Norman Conquest of 1066 and remained a part of English common law for the next few centuries. Sometime during the hundred or so years between the Protestant Reformation of the 1530's, the English Civil War of 1648 and the Restoration of the Monarchy in 1660, the priest-penitent privilege dropped out of English common law, never to return. *See* Yellin, *The History and Current*

Status of the Clergy-Penitent Privilege, 23 Santa Clara L.Rev. 95, 97-103 (1983). Therefore, as of the earliest days of this country, the privilege had not been part of the English common law for more than a hundred years and thus the privilege was not part of the English common law that we inherited.

The privilege first appears in America in an unreported, but much discussed, case from New York in 1813 titled *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813). In *Phillips*, a Catholic priest was excused from testifying during a criminal prosecution about statements his parishioner, the defendant, made. According to Yellin, the *Phillips* court held that the "free exercise of religion" would be infringed by forcing a priest to breach the seal of the confessional. Yellin, at 104-107. The "free exercise" reference is clearly a constitutional citation. *See Scott v. Hammock*, 870 P.2d 947, 952 (Utah 1994) ("the [*Phillips*] court based its ruling, not on common law or historical grounds, but on the principle that compelling a priest to breach the confidentiality of the confessional would violate the constitutional right to the free exercise of religion") (citing *Privileged Communications to Clergymen*, 1 Cath.Law. 199, 207 (1955), and Yellin, at 105).

Another writer provides the same history of the privilege. *See* Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn.L.Rev. 723 (1987). Mitchell repeats the history, the discussion of *People v. Phillips*, and emphasizes that the priest-penitent privilege was not part of English common law during the years preceding American independence and was therefore not part of the common law imported to America from England. Mitchell, at 736-38.

The few modern cases that discuss the origin of the priest-penitent privilege agree with the writings of Yellin and Mitchell and conclude that the privilege is rooted in the constitutional guarantee of the free exercise of religion. *See Griffin v. Coughlin*, 743 F.Supp. 1006, 1028 (N.D.N.Y. 1990) ("Based upon the foregoing discussion, it is this court's conclusion that the free exercise clause recognizes the need for privacy in confidential communications between inmate and spiritual advisor"); *Cimijotti v. Paulsen*, 230 F.Supp. 39, 41 (N.D.Iowa 1964) (compelled disclosures of statements made in recognized and required church matter would violate free exercise clause of First Amendment), *aff'd*, 340 F.2d 613 (8th Cir. 1965); *Scott v. Hammock*, 870 P.2d 947, 952 (Utah 1994).

The priest-penitent privilege thus grew from constitutional roots, not from common law. With this heightened lineage, New Hampshire's mandatory reporting statute requiring clergy to violate the privilege, and evidentiary rule providing only limited protection, must fall, leaving the disclosure of petitioner's communication without legal justification.

C. Petitioner's Conviction are Fruit of the Poisonous Disclosure.

Courts recognize, under the so-called "fruit of the poisonous tree" doctrine, that evidence derived from an illegal search, arrest or interrogation is inadmissible because the evidence is tainted by the underlying illegality. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963) (evidence obtained by illegal search cannot be used); *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (coerced statement is inadmissible). The same analysis

should govern here. The derivative use of petitioner's privileged statements to his elders, i.e., the instant criminal prosecution, violated petitioner's First Amendment rights. The entire prosecution, since it flows directly from the violation of the privilege ("A church elder privy to the conversation reported the defendant's interview to the police, which resulted in the convictions in this case," App. 6), should have been dismissed.

Counsel's failure to raise and pursue this dispositive argument meets both prongs of the test governing ineffective assistance of counsel, a significant error and resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

D. The Trial Court Erred in Allowing Admission of Petitioner's Privileged Statements to Impeach.

The trial court ruled before trial that the state could use petitioner's privileged statements to impeach petitioner should he testify. Again, because the privileged statements enjoy constitutional protection, it was error to allow their admission under any circumstances. In a close case that relied exclusively on the complainant's testimony (there was no physical evidence of any assaults), this pretrial ruling greatly affected petitioner's most important decision, whether to testify. If petitioner testified to deny the assaults, he would have faced his elders testifying about the privileged statements. If petitioner chose not to testify, which was the course he took, the jury does not hear petitioner's denial of the crimes.

This courts finds it "intolerable [when] one constitutional right should have to be surrendered in order to

assert another." *Simmons v. U.S.*, 390 U.S. 377, 394 (1968) (allowing a criminal defendant to testify in support of a suppression hearing without waiving his right to silence at the later trial). Here, it is the clash between defendant's First Amendment right to the sanctity of the confessional and his right to testify at his own trial. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *see Henry v. Kernan*, 197 F.3d 1021, 1026 (9th Cir.), *cert. denied*, 528 U.S. 1198 (1999) (state cannot use a coerced confession – obtained in violation of the Fourth Amendment – to impeach the defendant's trial testimony).

The trial court improperly forced petitioner to chose between these two constitutional rights. Trial counsel's failure to properly preserve and argue this second constitutional issue similarly meets the standard governing ineffective assistance, error and prejudice.

CONCLUSION

For the reasons stated above, petitioner respectfully asks that the Court grant this petition for writ of certiorari.

Respectfully submitted,

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By his attorney

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APPENDIX A

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0702, *State of NH v. Gregory Blackstock,* the court on December 23, 2003, issued the following order:

The court having reviewed the notice of appeal, the decision below is summarily affirmed in accordance with Rule 25(1)(b) on the basis that the trial court has issued an opinion identifying and discussing the issues presented, and the court does not disagree with the opinion.

The notice of appeal and any documents that were filed in this matter were provided to each justice whose name appears below.

Under Supreme Court Rule 25, the supreme court may in its discretion summarily affirm the ruling of a trial court. No appeal, however, is summarily affirmed except by unanimous vote of the court with at least three justices participating.

No justice who considered this matter voted to accept this appeal. Accordingly, the court decided to summarily affirm the decision of the trial court because this case included the opinion of the court which identified and discussed the issues presented and the supreme court did not disagree with the opinion. If any justice who considered this matter believed the appeal should have been accepted, this case would have been scheduled for briefing.

Summarily affirmed.

Brock, C.J., and Broderick, Nadeau, Dalianis and Duggan, JJ., concurred.

Eileen Fox,
Clerk

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Laura Mitchell, Supreme Court
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APPENDIX B

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
SOUTHERN DISTRICT 01-S-28

STATE OF NEW HAMPSHIRE

v.

GREGORY BLACKSTOCK

ORDER ON MOTION FOR A NEW TRIAL

On July 24, 2001, a jury convicted Gregory Blackstock ("the defendant") of three counts of Aggravated Felonious Sexual Assault. *See* RSA 632-A:2, I(e). On January 7, 2003, the Supreme Court affirmed the conviction in an unpublished order. *See State v. Blackstock*, 2001-695 (order dated Jan. 7, 2003). The defendant now moves for a new trial, asserting that his rights to counsel were violated when his trial counsel made an untimely disclosure of an expert witness, and when his trial counsel failed to appeal or argue two First Amendment issues. The State objects. For the reasons that follow, the Court *DENIES* the defendant's motion.

Standard of Review

The standards for determining whether a person has been deprived of the effective assistance of counsel under Part 1, Article 15 of the New Hampshire Constitution and under the sixth amendment to the United States Constitution are the same. *See State v. Allegra*, 129 N.H. 720, 723 (1987). The Court will therefore address the defendant's claim under the New Hampshire Constitution, using federal cases only to assist in its analysis. *See id.*

To prevail on an ineffective assistance of counsel claim, a defendant must show "first, that counsel's performance was deficient, and second, that counsel's performance resulted in actual prejudice to the outcome of the defendant's case." *State v. Henderson*, 141 N.H. 615, 618 (1997). With regard to the second element:

> the defendant must demonstrate that there is a reasonable probability that the result of the proceeding would have been different had he received competent legal representation. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case

Id.

In the present case, the Court need not analyze whether trial counsel's performance was deficient because the defendant has failed to demonstrate that trial counsel's alleged deficiencies resulted in actual prejudice to the outcome of the defendant's case. *See State v. Killam*, 137 N.H. 155, 158 (stating that because the object of an ineffective assistance of counsel claim is not to grade counsel's performance, courts should dispose of ineffectiveness claims on the grounds of lack of sufficient prejudice if that course is easier).

Analysis

1. Expert Witness

The State's case rested on the testimony of two ten year old girls ("the girls"), who described events that occurred when they were eight years old. The defense asserts that explaining how ideas cold have been implanted in the girls' minds was a critical defense at trial.

To carry out this defense, trial counsel retained an expert, Dr. Mart, two weeks before trial and disclosed this expert to the state approximately one week before trial. The state objected to Dr. Mart's testimony, arguing untimely disclosure, and the trial court sustained the objection. The defendant claims that his counsel's failure to obtain and disclose this witness in a timely manner constitutes ineffective assistance of counsel.

First of all the defendant has failed to established that Dr. Mart's testimony would have been admissible at trial. "[E]xpert testimony must rise to a threshold level of reliability to be admissible." *Baker Valley Lumber v. Ingersoll-Rand*, 148 N.H. 609, 613 (2002). To determine reliability, the Court employs a flexible test that places special emphasis on four factors: "(1) whether a theory or technique . . . can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error" of a particular technique; and (4) the *Frye* general acceptance test." *Id.* (applying the test established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). The defendant in this case has not demonstrated that Dr. Mart's testimony would have been admissible under the *Daubert* test. Therefore, the defendant cannot establish a reasonable probability of a different result had timely expert disclosure been made.

Assuming Dr. Mart's testimony is admissible, the defendant has failed to demonstrate that there is a reasonable probability that a different verdict would have been reached by the jury. A jury, of course, is free to reject an expert's opinion. Additionally, defendant's counsel through cross examination of the victims and their mother and by final argument vigorously attacked the credibility

of the victims. Furthermore, had defendant's expert in fact been disclosed in a timely fashion, it is probable that the State would have obtained its own expert to contradict defendant's expert.

It is also interesting to note that the defendant has provided no evidence of Dr. Mart's anticipated testimony other than a twelve (12) line letter dated July 16, 2001, which in the most general terms describes the concepts about which Dr. Mart believes he could offer testimony. There is nothing before the Court by which it can determine what the actual testimony of Dr. Mart would have been. The defendant has failed to demonstrate that there is a reasonable probability that had Dr. Mart testified, a different verdict would have resulted.

The ultimate conclusion to be drawn from the defendant's argument is that in any prosecution for sexual assault against a child, failure to retain an expert such as Dr. Mart would constitute ineffective assistance of counsel. Such a conclusion is absurd.

2. First Amendment Issues

The defendant and the girls are both Jehovah's Witnesses. When an elder in the church received a complaint from the victims' mother that the defendant sexually abused the girls, he required the defendant to submit to questioning in the presence of two other elders. Under Jehovah's Witness practice and custom, this questioning is necessary to remain in good standing in the church, and is understood to be confidential. A church elder privy to the conversation reported the defendant's interview to the police, which resulted in the convictions in this case.

Before trial, the parties litigated the admissibility of the defendant's statements to the elders. The Court issued an order ruling that the defendant's statements were not admissible because they were protected by the Religious Privilege, i.e., Rule of Evidence 505. *See State v. Blackstock*, Hillsborough County Superior Court-Southern District, No. 02-S-28, Order dated May 7, 2001 (Groff, J.). Prior to trial, the Court modified its ruling to allow the state to impeach the defendant with his statements to the Elders if the defendant testified at trial.

The defendant claims that the ruling of the Court permitting the use of the statements to the "Elders", violated the fruit of the poisonous tree doctrine, because it permitted a derivative use of the statements, and violated the defendant's First Amendment right to the free exercise of his religion. The Court finds that the use of the defendant's statements for impeachment purposes does not violate defendant's constitutional rights, and that the failure of the defendant's counsel to appeal this Court's ruling does not constitute ineffective assistance of counsel.

First of all, a defendant may challenge a Court's decision to allow evidence to be used for impeachment purposes, only if he actually testified at the trial and was impeached by the use of the challenged evidence. *State v. Bruneau*, 131 N.H. 104, 115 (1988). If "the defendant never testified and was never impeached [then] we have no way of knowing whether his decision to remain off the stand was influenced to any degree by the ruling . . . any more than we can tell what would have happened if he had testified. We do not know whether his testimony would have differed from the substance of his statement, or whether the State would actually have used the statement to impeach him." *Id* at 115. The claim of prejudicial

error is too speculative for adjudication. Therefore, since the defendant did not in fact testify and was not impeached, the issue cannot be raised on appeal.

In any event, the Court finds that the trial Court's rulings were not erroneous. The defendant misconstrues the fruit of the poisonous tree doctrine. That doctrine prevents the use at trial of evidence "come at by exploitation of evidence discovered by violation of the defendant's constitutional rights. The fruit of the poisonous tree doctrine concerns challenged evidence which is secondary or derivative in character." *Wong Sun v. United States*, 407 (1963). In the instant case, the statement sought to be suppressed was the direct product of the violation of the Religious Privilege under Rule of Evidence 505. The fruit of the poisonous tree doctrine is not applicable. The defendant has not articulated what derivative evidence was obtained by exploitation of the violation of his privilege. The evidence at trial was that the children disclosed the abuse to their mother prior to her contacting the Elders, and prior to any meetings with the Elders. The evidence at trial was as a result of that disclosure, and not the defendant's statement to the Elders. The fruit of the poisonous tree doctrine is inapplicable.

As the Court understands the defendant's second Constitutional argument, he claims that the use of the defendant's statements made during the confidential discussions with the Elders to impeach his testimony at trial would violate his Constitutional right to the free exercise of religion under the First Amendment to the United States Constitution. The First Amendment to the United States Constitution of course provides that Congress shall make no law prohibiting the free exercise of religion. "The free exercise of religion means, first and

foremost, the right to believe and profess whatever religious doctrines one desires." *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 892, 877 (1990). The first Amendment obviously excludes all "governmental regulation of religious beliefs as such." Id. "The right of free exercise of religion does not relieve an individual of his obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that has religious prescribes (or proscribes)." *Id* at page 878. The use of a statement of a defendant disclosed by an Elder in violation of a religious confidentiality requirement does not in any way constitute a violation of the defendant's right to exercise his religion. The defendant has cited no case law to support such an extension of the First Amendment.

The suppression of evidence obtained in violation of the Fourth or Fifth Amendments to the United States Constitution or Part 1 Article 15 and 19 of the New Hampshire Constitution is mandated by the so-called "exclusionary rule." This rule has been fashioned by the courts to deter police misconduct. See *Mapp v. Ohio*, 81 S.Ct., 1684 (1961), *State v. Canelo*, 139 N.H. 376 (1995). The exclusionary rule has been applied to evidence obtained by unlawful searches and seizures, coerced confessions, and violation of the *Miranda* requirements.

However, the exclusionary rule does not generally prohibit the introduction of illegally obtained evidence which is to be admitted for the limited purpose of impeaching the defendant's testimony. Evidence obtained as a result of an unconstitutional search and seizure is admissible to impeach the defendant. *Walder v. United States*, 74 S.Ct. 354 (1954). A statement obtained in violation of the requirements of *Miranda v. Arizona* is admissible to

impeach the defendant. *Harris v. New York*, 91 S.Ct. 643 (1971). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." Id. 645. However, involuntary statements of a defendant can never be used to impeach his testimony at trial. *Mincey v. Arizona*, 98 S. Ct. 2408 (1978).

The statements made by the defendant to the Elders were not obtained in violation of any of the defendant's constitutional rights. The statements were inadmissible because they were subject to the so-called religious privilege, New Hampshire Rule of Evidence 505. It is clear that such statements while inadmissible in the State's case in chief, are admissible to impeach the defendant if he should testify. Such use of the statements is not proscribed by the State or Federal Constitutions, nor by any policy which has been articulated in the Federal or State courts. Under the court's rationale in *Mincey v. Arizona*, the defendant's statement is clearly admissible for impeachment purposes.

The Court's determination that the defendant's statements would be admissible to impeach the defendant if he testified at trial in contradiction of those statements was not erroneous. Therefore, no claim of ineffective assistance of counsel can be made for counsel's failure to appeal this Court's order regarding the admissibility of the defendant's statements for the purpose of impeachment.

Conclusion

The defendant's motion for a new trial is therefore *DENIED*.

So Ordered.

August 26, 2003

/s/ William J. Groff
William J. Groff
Presiding Justice

APPENDIX C

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2001-695, *The State of New Hampshire v. Gregory Blackstock*, the court on January 7, 2003, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. We affirm.

In July 2001, the defendant, Gregory Blackstock, was convicted in Superior Court (*Groff*, J.) of three counts of aggravated felonious sexual assault: one count involving S.B. and two counts involving her twin sister B.B. A trial, the State objected to the defendant's proffer of an expert witness because of late notice. Over the defendant's objection, the State's motion to preclude the testimony was granted. The defendant's motion to set aside the verdicts, alleging insufficiency of the evidence, was denied on September 20, 2001. This appeal followed.

The defendant first argues that the trial court erred in denying his motion to dismiss for insufficient evidence. He argues that the testimony was insufficient for the jury to conclude that he touched the victims' genitalia, as opposed to their legs or lower stomach area. We disagree. S.B. and B.B. each testified that the defendant touched her "private," then indicated the location of her "private" by circling the area on an anatomically correct drawing of a girl. They described feeling "weird" as a result of this contact, and not wanting to tell anyone about what had occurred. Although the circles drawn by S.B. and B.B.

upon the anatomically correct drawings extend slightly beyond the genitalia, when combined with their use of the word "private," the jury could have found beyond a reasonable doubt that the defendant touched the victims' genitalia. *See State v. Graham*, 142 N.H. 357, 361 (1997); *State v. Blackstock*, 147 N.H. 791, 794-95 (2002).

The second issue is whether the trial court erred when it excluded the defendant's expert witness from testifying concerning a theory of defense "solely because of late notice and without considering any lesser sanctions." Superior Court Rule 98 B(3) requires that a defendant notify the State at least thirty days before jury selection of "all results or reports of physical or mental examinations, scientific tests or experiments or other reports or statements prepared or conducted by experts which the defendant anticipates calling as a witness at the trial or hearing, as well as a summary of each such expert's qualifications." *Super. Ct. R.* 98 B(3)(ii). The defendant's brief asserts that "[c]ounsel explained [to the trial court] that he had just recently thought of [the] defense, which was the reason the usual thirty-day notice was not given." The defendant argues that the trial court's exercise of discretion in excluding the expert's testimony was unsustainable, and arguers further that even if the exercise of discretion was sustainable under the rules, the trial court violated his fundamental due process right under Part I, Article 15 of the New Hampshire Constitution to present witnesses on his own behalf. The defendant concedes, and we agree, that the framework for analyzing his claim is set forth in *State v. Cromlish*, 146 N.H. 277 (2001).

In general, the admissibility of evidence is within the trial court's sound discretion, and we will not reverse the trial court's ruling unless it constitutes an unsustainable

exercise of discretion. *See State v. Lambert*, 147 N.H. 295, 296 (2002). To show an unsustainable exercise of discretion, the defendant must demonstrate that the trial court's decision was clearly unreasonable and that the decision prejudiced his case. *See Cromlish*, 146 N.H. at 280-81.

In this case, the record indicates that the judge gave defense counsel the opportunity to explain the reason for the late notice. although this case had been pending since January 2001 and trial had already been continued numerous times, counsel explained that he had "just thought of" the theory. The trial court, nonetheless, balanced the defendant's rights against the burden his request placed upon the court system, *see Cromlish*, 146 N.H. at 283-84, noting that there had been a number of continuances requested on or close to the trial date throughout the history of the case, the result being that although "this case has been scheduled for trial a number of times . . . we never seem to get there." In addition to the burdens that such continuances placed upon the court system, each continuance on the eve of trial required the State to commit additional resources to repeat trial preparation at a later date. *See id.* at 285. In light of these considerations, the court properly excluded the testimony of the expert witness under the rules.

We now conduct a separate constitutional analysis of the trial court's exercise of discretion. In reviewing the trial court's ruling, we defer to the trial court's factual findings unless those findings are clearly erroneous, and consider *de novo* the court's conclusions of law in respect to those factual findings. *See State v. Paone*, 142 N.H. 216, 219 (1997).

> A defendant's right to seek out and present witnesses on his behalf is a fundamental due process right. The right to present witness testimony, however, is dependent entirely on the defendant's affirmative exercise of that right. . . . When considering excluding or limiting evidence offered under Part I, Article 15 of the New Hampshire Constitution as a discovery sanction, the trial court should consider such factors as the probative value and reliability of the proposed evidence, the effectiveness of less severe sanctions, the integrity of the adversary process, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery rule, the willfulness *vel non* of the violation, the relative simplicity of compliance, and whether or not some unfair tactical advantage has been sought.

Cromlish, 146 N.H. at 283-84 (brackets, quotation and citations omitted). As to the probative value of the proposed witness and the potential prejudice to the truth-determining function of the trial process, the trial court stated:

> [C]ertainly it's relevant testimony from this expert, but the jury has plenty of information based on the facts as you allege them to be in your cross examination of the mom in this case. . . . [T]here is evidence . . . by which the jury could find, based on the evidence you wish to present in this case, that [the memories of S.B. and B.B.] were implanted. . . . [While] that evidence from the expert may be relevant [and] may be effective, . . . to a certain extent it is cumulative, and I

> haven't deprived you of being able to present your defense.

Thus, the trial court concluded that the testimony of the proposed expert, while useful and relevant, would have had diminished probative value. In addition, the explanation given for the failure to seasonably abide by the discovery rule was wholly unsatisfactory, and the last minute nature of the defendant's request undermines his assertion that the testimony was critically important. Based upon our review of the record, we conclude that the trial court's order precluding testimony from the defendant's proposed expert did not violate his rights under the State Constitution.

Affirmed.

BROCK, C.J., and BRODERICK, NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox,
Clerk

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